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CITATIONS

Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 558

R. H. NYE AND L. C. MAYERS, PETITIONERS

v.

THE UNITED STATES OF AMERICA AND W. B. GUTHRIE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and judgment appear at R. 153–158. The opinion of the Circuit Court of Appeals (R. 167–173) is reported in 113 F. (2d) 1006.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 30, 1940 (R. 173–174). The petition for a writ of certiorari was filed November 7, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925

(U. S. C., Title 28, Section 347). In the Government's view, neither this Court nor the Circuit Court of Appeals has jurisdiction to review the judgment of the District Court.

QUESTIONS PRESENTED

1. Neither the appeal to the Circuit Court of Appeals nor the petition for a writ of certiorari was filed within the time prescribed by the Criminal Appeals Rules, promulgated May 7, 1934. There was no petition for an allowance of an appeal, as required in criminal cases prior to the Criminal Appeals Rules by Section 8 (c) of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 230) and still required in cases which are not governed either by these Rules or by the Federal Rules of Civil Procedure. Both the time and method of appeal were proper, if the Rules of Civil Procedure govern. The question is whether the civil rules, the criminal rules or the old practice applies to the present case. The answer largely depends on whether the petitioners were accused and adjudged guilty of civil or criminal contempt.

Assuming that this Court has jurisdiction, the following questions arise:

2. Whether the findings of the District Court sustain the judgment holding petitioners guilty of "misbehavior * * * so near" the court "as to obstruct the administration of justice," under

Section 268 of the Judicial Code (U. S. C., Title 28, Section 385)?

3. Whether the evidence is sufficient to support the findings?

4. Whether the District Court was without jurisdiction because the motion for a rule to show cause was not verified, although a verification was filed before the respondents answered or the objection was made?

5. Whether the judgment of contempt should be set aside because of the settlement of the action at law in connection with which the contempt was committed?

STATUTES AND RULES INVOLVED

The statutes and rules involved are set forth in the Appendix, *infra,* pp. 43–45.

STATEMENT

On March 18, 1939, W. H. Elmore, administrator of the estate of his son James Elmore, instituted an action, *in forma pauperis,* in the United States District Court for the Middle District of North Carolina against T. C. Council and Germain Bernard, partners, trading as B. C. Remedy Company (R. 153–154). The complaint alleged that James Elmore died as a result of the use of a proprietary medicine known as BC, manufactured and sold by the defendants, and claimed $30,000.00 damages for negligence and deceit in the manufac-

ture and labeling of this substance. Jurisdiction was based upon diversity of citizenship (R. 1–4). The District Court appointed William B. Guthrie to represent Elmore in the prosecution of the action (R. 153–154). The defendants filed an answer on April 29, 1939, and asked for a jury trial (R. 6, 154).

On April 19, 1939, shortly before the answer was filed, Elmore mailed a letter addressed to District Judge Hayes at Greensboro, North Carolina, asking that his action for wrongful death be dismissed. He enclosed a copy of a letter of the same date to W. B. Guthrie, his attorney, notifying him of his desire to terminate the action. At the request of Guthrie, the court delayed action, pending an investigation (R. 154). On July 20, the petitioner, Nye, appeared with his counsel before the District Court in Greensboro and was examined under oath with respect to his knowledge of Elmore's letters to Judge Hayes and to Guthrie. Nye admitted that he had retained counsel to put a stop to Elmore's action, that Elmore's letters were dictated by this attorney and written by his secretary, that he took Elmore to the post office to mail the letters, retaining the registry receipt himself, and that he also had his attorney prepare Elmore's final account as administrator and took Elmore to the Probate Court to file the account and have himself discharged. But Nye alleged and testified that he did these things at Elmore's request (R. 155).

On August 29, 1939, the defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator by the Clerk of the Court of Robeson County, North Carolina, and the estate had been fully administered (R. 155). A hearing was held on this motion on September 29, 1939, and W. H. Elmore testified upon oath regarding the circumstances under which he had been discharged as administrator, as follows (R. 7–8):

> That on the day before April 19th, 1939, L. C. Mayers came to the place where I was at work near Conway, South Carolina, and gave me some liquor. I was ditching. After talking to me and giving me liquor, he said Mr. R. H. Nye wanted me to come to Lumberton to see him and that Mayers had come after me; that Nye wanted to see me about the case I had in Federal Court against B. C. Remedy Company. He got me intoxicated and persuaded me to go with him to Lumberton right then. He did not want to wait for me to put on clean clothes or notify my daughter, with whom I then lived and promised to bring me back that afternoon. He took me about sixty miles to R. H. Nye's office in Lumberton and there Nye talked to me and told me there was nothing in the case, that lawyer Carlyle was a good lawyer and he said there was nothing to it; that Nye's daughter had married a son of defendant Council and R. H. Nye was anxious to get the same

stopped. He then sent me to his home where I was accompanied constantly by L. C. Mayers, and spent the night, staying with Mayers who continued to supply liquor during the night, and the next morning Mayers turned me over to Nye, who then took me to a lawyer's office where he had me to sign up some papers that I did not understand because of my condition; that Nye took me to the Court House where some other papers were signed but I did not know what they were. He then took me to the Post Office and mailed some papers; that Nye did not pay or promise to pay me anything. And Nye furnished the lawyer, paid for everything and the postage and then sent me home by Mayers; that during all this time I was intoxicated and did not know what I was doing. I did not know that I had sworn that I had fully administered my son James Elmore's estate, and did not know that I had been discharged as administrator, nor that I had signed a letter and mailed it to the Judge of the Federal Court, asking him to dismiss my case against the B. C. Remedy Company. I did not have a chance to communicate with my lawyer and all this was done while I was intoxicated.

I have no education and my occupation was a cotton mill hand.

I do not want the case stopped but I want it tried.

On the following day, September 30, 1939, Guthrie, through an attorney named Brooks, filed a document entitled "Motion for Order to Show Cause" (R. 9–12) in which he set forth among other things the substance of Elmore's testimony, and moved (R. 12):

> (1) for an order requiring Nye to show cause why he should not be attached and held for contempt of court;
>
> (2) that the court request the United States Attorney to investigate "whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. C. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court;"
>
> (3) that "this matter" be submitted to and inquired into by the Grand Jury; and
>
> (4) "For such other and further procedure as to this Court may seem proper."

On the same day the District Judge issued an order directing Nye and Mayers to show cause why they should not be adjudged in contempt of court, "it appearing to the Court that W. H. Elmore, on oath testified to facts that, the said R. H. Nye and L. C. Meyers (Mayers) have been guilty of behavior contemptuous of this Court." (R. 8–9).

Guthrie's motion of September 30 was unverified, but on October 7, 1939, he filed a verification and prayed that it be attached to and made a part of the petition (R. 13). On October 30th, the respondents appeared specially and moved to strike out service of the rule to show cause on the ground that the contemptuous conduct, if any, took place outside the jurisdiction of the court (R. 13–14). The Court apparently treated this objection as a general motion to dismiss the rule and denied it, "The Court being of the opinion that the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion." (R. 16). On the same day, the petitioners filed answers giving their own version of the occurrence and denying any wrongful conduct in connection with Elmore's discharge as administrator or any intentional disrespect to the court or intent to interfere with the administration of justice (R. 17–25).

Evidence was thereupon introduced by Guthrie and by the petitioners. Both at the conclusion of the prosecution's testimony and at the end of the case, motions were made to dismiss (R. 16, 153). The court set November 17 for argument of these motions. On that date, petitioners amended their motion to dismiss and for the first time presented

the contention that the court was without jurisdiction to issue the rule to show cause or to proceed because the motion to issue the rule was unverified (R. 15–16).

On February 8, 1940, the District Court filed its findings of facts and judgment (R. 153–158). The court found that Mayers (also referred to as Meares) and Nye, whose daughter was married to the son of C. T. Council, acted in concert to put a stop to Elmore's action against Council and Bernard (R. 156–157). Mayers was Nye's tenant and knew Elmore (R. 156). Nye sent Mayers to bring Elmore to Lumberton from his home in South Carolina (R. 156.) Elmore is illiterate and feeble, both physically and mentally (R. 157). Mayers found him working in a ditch (R. 157), gave him liquor (R. 158) and, without giving him time to change his clothes, took him away with the promise to return him that night (R. 157). As soon as Nye talked to him, he called Timberlake, his attorney, by long distance telephone and arranged to meet him at his office early the next morning. Nye and Mayers arranged to keep Elmore in their presence over night. Although he had a son living in Lumberton, he and Mayers slept at Nye's house. In the morning Nye took Elmore to Timberlake's office, told Timberlake that Elmore wanted to drop his action in the District Court, and that he, Nye, wanted it fixed up so as to end the action once and for all. Nye directed Timber-

lake to prepare the letters to Guthrie and to the District Judge, and to have Elmore discharged as administrator (R. 157). While Elmore did not remain intoxicated until he signed the letters and final account, he was completely under the domination of Mayers and Nye, neither of whom paid or promised him anything to discontinue the action (R. 158). Nye acted with the express purpose of obstructing the trial of the action on its merits. His and Mayer's conduct caused a long delay, several hearings and enormous expense (R. 157–158).

On these facts, the Court adjudged Nye and Mayers guilty of contempt of court, holding that their conduct constituted "misbehavior so near to the presence of the court as to obstruct the administration of justice." Nye was ordered to pay a fine of $500 and costs of the contempt proceedings, including $500 to Guthrie, who "through * * * untiring efforts and at great expense discovered and brought to the attention of the court the contempt for its authority." Mayers was fined $250. They were ordered to stand committed until they complied with the judgment (R. 158). Exceptions to the findings and judgment were allowed by the District Court (R. 158–159).

On March 13, 1940, Elmore, with the assent of Guthrie, took a voluntary non-suit in his action for wrongful death (R. 25) upon payment of a "substantial sum" (R. 173). On March 15, 1940, the petitioners filed a notice of appeal from the judg-

ment of contempt (R. 165) and statement of points to be relied upon (R. 159–164). When the case was docketed in the Circuit Court of Appeals, the United States was made a party. Appearances were entered on its behalf by the United States Attorney and an Assistant United States Attorney, but they took no further part in the proceedings (R. 167).

The Circuit Court of Appeals held that the findings were "amply supported by the evidence" (R. 168); that the conduct of the petitioners "interfered with the court in the performance of its functions" and constituted misbehavior "so near thereto as to obstruct the administration of justice," under Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385); that it was not essential that the motion for a rule to show cause be verified and, if it was essential, the verification, filed before the petitioners responded to the rule, sufficed to remedy the defect; and, finally, that the settlement of Elmore's action did not affect the preceedings for contempt (R. 170–173). The judgment was unanimously affirmed on August 30, 1940 (R. 173–174).

SUMMARY OF ARGUMENT

I

If the contempt proceeding was not a civil action at law to which the Rules of Civil Procedure apply, there are fatal objections both to the jurisdiction of this Court and to that of the Circuit

Court of Appeals. The appeal to the Circuit Court of Appeals was neither petitioned for nor allowed; it was taken by notice of appeal. Hence, if the practice is governed by Section 8 (c) of the Act of February 13, 1925 (U. S. C., Title 28, Sec. 230) the appeal was improperly perfected and the Circuit Court of Appeals was without jurisdiction (*McCrone* v. *United States,* 307 U. S. 61). If the Criminal Appeals Rules promulgated May 7, 1934, are applicable, the notice of appeal was effective. But in that event both the appeal to the Circuit Court of Appeals and the petition for a writ of certiorari were filed too late.

The Government concedes that the Rules of Civil Procedure apply if the contempt was civil and argues that if the contempt was criminal, the Criminal Rules apply. This result accords with the traditional view of contempts as civil or criminal proceedings for most of the purposes which make the distinction important. It also accords with the intention of Congress in authorizing the promulgation of the Civil Rules, the Criminal Appeals Rules and, recently, rules governing proceedings in criminal cases prior to and including verdict or finding. If criminal contempts are not included in the Criminal Appeals rules, they are beyond the rule-making power under the recent statute. In consequence, an unfortunate and unanticipated hiatus would exist in the power of the Supreme Court to regulate procedure in the District Courts.

The language of the enabling Act of March 8, 1934 (C. 49, 48 Sat. 399) does not require this result.

II

The contempt adjudicated and charged was unmistakably criminal and the proceeding was appropriate for the purpose. For purposes of appeal, the nature of the judgment is decisive of the criminal or civil character of the contempt. The judgment in the present case was clearly criminal; it imposed unconditional fines payable to the United States. Apart from the nature of the sentence, the judgment specifically found the petitioners guilty of misbehavior so near the presence of the court as to obstruct the administration of justice. This was unequivocal evidence that the purpose of the fines and of the adjudication of contempt was to vindicate the authority of the court, not to perfect the remedies of a private suitor.

If the proceedings anterior to the judgment are also examined, they support the same conclusion. The prayer of the motion for a rule to show cause was not for remedial punishment in aid of the main suit. It speaks the language of public justice not of private litigation. The acts charged were unmistakably criminal contempt, if contempt at all. They did not violate a court order; they obstructed the work of the court and attempted to deceive the judge. Moreover, the respondents to the rule to show cause were not parties to a pend-

ing action; they were strangers. And the movant for the rule was not the plaintiff in the action, but his attorney. While the proceedings were entitled in the original action and the United States was not a party until the appeal, neither circumstance is decisive of the nature of the contempt. The defendants could not have been uncertain that punishment rather than relief was the object in view.

Since the contempt was criminal the jurisdictional objection must prevail. In any event, the proceedings were adequate to support the imposition of a criminal penalty.

III

The findings of fact support the conclusion that the petitioners were guilty of misbehavior so near the presence of the court as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code.

The petitioners' conduct was contumacious. It was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and misrepresentation made to the court. There is ample authority that such an attempt is a contempt when the means consists of force or threats directed against a suitor. The type of influence exerted in the present case is indistinguishable. Moreover, the conduct of the petitioners amounted to a misrepresentation. It is recog-

nized that falsehood may have obstructive qualities which warrant a finding of contempt.

The closer question is whether the misbehavior was in the presence of the court or "so near thereto as to obstruct the administration of justice." We contend that it was. The early view that the power of summary punishment in cases of misbehavior is confined by the statute to assuring order and decorum in court has been abandoned. It is also clear that the language is not to be "spatially construed." It is unnecessary to rely upon the majority opinion in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402; the present case falls fairly within the dissenting opinion of Mr. Justice Holmes. A court without plaintiffs cannot do business as a court. While the petitioners' effort to eliminate Elmore as a plaintiff ultimately failed, there was an actual obstruction of the administration of justice. Moreover, the letter which the petitioners had Elmore write to the judge was itself contumacious. They were therefore guilty of misbehavior in the actual presence of the court.

IV

There is no merit in the contention that the District Court was without jurisdiction because the verification was filed a week after the motion for an order to show cause. The petitioners were not attached on the basis of the motion and raised no objection on this score until after they had an-

swered and the evidence had been taken. Accordingly, if there was a technical defect, it was waived. Moreover, the principal allegations of the motion had been sworn to in open court before the motion was made. Under these circumstances, the court might have issued the rule *sua sponte*. The respondents to the rule were entitled to be advised of the nature of the charge against them and to be given a fair opportunity to defend. They do not contend that these rights were denied.

V

Petitioners argue that the settlement of Elmore's action for wrongful death, pending this appeal, requires the judgment of contempt to be set aside. The contention rests upon the premise that the contempt was civil and the premise is unsound.

ARGUMENT

I

UNLESS THE CONTEMPT PROCEEDING WAS A CIVIL ACTION, THE WRIT OF CERTIORARI SHOULD BE DISMISSED OR THE JUDGMENT SHOULD BE REVERSED WITH DIRECTION TO THE CIRCUIT COURT OF APPEALS TO DISMISS THE APPEAL

If the contempt proceeding was not a civil action at law to which the Rules of Civil Procedure apply (see Act of June 19, 1934, c. 651, Sec. 1, 48 Stat. 1064; Rules of Civil Procedure, Rule 1) there are fatal objections both to the jurisdiction of this Court and to that of the Circuit Court of Appeals.

1. The appeal to the Circuit Court of Appeals was neither petitioned for nor allowed; it was taken by notice of appeal. The notice would be effective under the Rules of Civil Procedure (Rule 73) or under the Criminal Appeals Rules, promulgated May 7, 1934 (Rule III). But if neither set of rules is applicable, the notice was insufficient. For in that event, the practice is governed by Section 8 (c) of the Act of February 13, 1925, (U. S. C., Title 28, Sec. 230) which requires an application to be made. A notice of appeal is ineffective to meet this requirement and the requirement is apparently jurisdictional (*McCrone* v. *United States,* 307 U. S. 61; *Alaska Packers Assn.* v. *Pillsbury,* 301 U. S. 174; *Osborn* v. *United States,* 50 F. (2d) 712 (C. C. A. 4th); *Share* v. *United States,* 50 F. (2d) 669 (C. C. A. 8th); *Vaughan* v. *American Insurance Co.,* 15 F. (2d) 526 (C. C. A. 5th). The decision in *Reconstruction Finance Corporation* v. *Prudence Securities Advisory Group,* No. 69, present Term, decided January 6, 1941, was not, presumably, intended to affect this rule in cases governed by Section 8 (c) of the Act of 1925.

2. If the Criminal Appeals Rules are applicable, the notice was effective under Rule III but both the appeal to the Circuit Court of Appeals and the petition for a writ of certiorari were filed too late. Rule III requires that an appeal be taken within five days after entry of judgment of conviction or of an order denying a motion for a new trial.

Rule XI requires that petitions for writ of certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of judgment of that court. In the present case, the notice of appeal was filed more than a month after the judgment and sentence of the District Court and the petition for a writ of certiorari was filed fifty-eight days, excluding Sundays and holidays, after the judgment of the Circuit Court of Appeals. Timeliness of appeal and petition are jurisdictional requirements (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417–418; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, Secs. 381, 386, and p. 777, note 40; *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th); *United States* v. *Touisey*, 101 F. (2d) 892 (C. C. A. 7th).

3. While contempt proceedings are inescapably hybrid (see *Myers* v. *United States*, 264 U. S. 95, 103; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326), we think the new procedural rules are applicable and that the distinction between civil and criminal contempt determines which of the rules apply.

McCrone v. *United States*, 307 U. S. 61, 65, suggests though it does not hold that the Rules of Civil Procedure are applicable to civil contempt. The remedial function of such proceedings and the tradition to regard them as an aspect of the civil case in which the contempt occurs (*Fox* v. *Capital Co.*, 299 U. S. 105, 107–108; *Leman* v. *Krentler-*

Arnold Co., 284 U. S. 448, 452–454), hardly permit any other result.

A comparable tradition views criminal contempts as criminal cases for most[1] though not all,[2] of the purposes for which the classification is important. In accordance with this tradition and the punitive function of criminal contempt, we should expect the Criminal Rules to apply. The decision in *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th) holds that they do. An argument to the contrary may, however, be founded on the language of the enabling Act of March 8, 1934, c. 49, 48 Stat. 399, and of the Order promulgating the Rules. The Act refers to "any

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[1] Cf. *United States* v. *Goldman*, 277 U. S. 229, 235 (direct appeal by the Government under the Criminal Appeals Act); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 336 (included in statute conferring appellate jurisdiction in "criminal cases"); *Ex parte Kearny*, 7 Wheat. 38; *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 410 (criminal convictions not reviewable by Supreme Court on writ of error); *Ex parte Grossman*, 267 U. S. 87 (within the power of the President to pardon "offences against the United States"); *Gompers* v. *United States*, 233 U. S. 604 (included in statute of limitations applicable to "any offense not capital"); see also *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 444, 446, 448 (self-incrimination, right to be informed and presumption of innocence).

[2] Cf. *Gompers* v. *United States*, 233 U. S. 604, 610; *Ex parte Grossman*, 267 U. S. 87, 116 (constitutional right to jury trial); *Myers* v. *United States*, 264 U. S. 95 (venue). See also *Bowles* v. *United States*, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648 (affidavit of prejudice under U. S. C., Title 28, Sec. 25).

or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The Order speaks of "all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived." See 292 U. S. 660, 661. Both are applicable in terms to cases in which the contemnor pleads guilty or in which there is a right to a jury trial under Sections 21 and 22 of the Clayton Act, c. 323, 38 Stat. 730, 738–739 (U. S. C., Title 28, Secs. 386–387). But neither the Act nor the Order specifically refers to proceedings after finding of guilt by a trial court where there is no right to a jury and a jury has, therefore, not been waived—a typical situation in cases of criminal contempt. We contend that the Rules are applicable, nevertheless; that, under the language quoted, they apply "in criminal cases"; and that the remaining words are simply descriptive of the ordinary situations in which there has been a finding of guilt. In our view, the questionable language serves to designate the finding as the stage of the proceedings "in criminal cases" at which the rule-making power was to attach and the rules to begin to operate, not the kinds of cases in which the rules were to apply.

This contention is supported by the history of the enabling Act of 1934. The dominant purpose of the statute like that of the earlier Act of February 24, 1933 (c. 119, 47 Stat. 904) was to expedite

the disposition of criminal appeals [3] The precise language of the amended statute was the product of a doubt that the earlier Act empowering the court to prescribe rules "after verdict in criminal cases" would apply to cases in which the finding of guilt was by the court. The problem was noted by the Chief Justice in a letter to the Attorney General, dated January 11, 1934, with reference to the draft of proposed rules submitted by the Department of Justice. The Chief Justice said:

> * * * In this draft, rules are proposed with respect to proceedings after "a verdict of guilty or finding of guilt by the trial court." The statement as "to finding of guilt" presumably has references to cases in which trial by jury has been waived. It is not clear that a finding by the court in such a case would be deemed to be a "verdict" within the meaning of the Act conferring authority to prescribe rules. Without intimating an opinion upon this question, it is desirable that any doubt should be removed by an explicit statement. It is manifestly not desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from those in which there is a finding of guilt by the court on the waiver of a jury.
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> * * * * *

[3] See H. Rept. 2047, 72d Cong., 2d Sess.; S. Rept. 257, 73d Cong. 2d Sess.; H. Rept. 858, 73d Cong., 2d Sess.

> After consultation with the other members of the Supreme Court, and in order to remove all questions as to the authorized scope of the rules to be promulgated, I suggest that it would be well to propose an amendment to the statute so as expressly to cover cases in which there has been a finding of guilt by the trial court and cases of pleas of guilty * * *.

It seems clear that the amendatory Act of 1934 purported to embody this suggestion. And while the precise language may have its roots in the understanding of "finding of guilt" to refer to the usual case in which trial by jury has been waived, the articulate purpose of the amendment was to broaden the statute to avoid the limiting connotations of the word "verdict." It was deemed to be undesirable to have different appellate procedures for conviction on jury verdict and conviction by the court on waiver of jury. (See S. Rept. 257, 73d Cong., 2d Sess.; H. Rept. 858, 73d Cong., 2d Sess.); there is even less reason to differentiate between cases where the court's finding of guilt is made after waiver of jury and cases where there was no right to jury trial which might be waived.

If the enabling Act and the Order are inapplicable to criminal contempts tried without a jury, there is an unfortunate and, so far as we know, unanticipated hiatus in the power of the Supreme Court to regulate procedure in the District Courts. The Court is now authorized to prescribe "rules of pleading, practice, and procedure with respect to

any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases" (Act of June 29, 1940, c. 445, 54 Stat. 688 (28 U. S. C. A., Sec. 723b)). The language thus parallels and complements that of the Act authorizing the Criminal Appeals Rules. The framers of the Act of 1940 certainly believed that it filled the last gap in the rule-making power of this Court;[4] such was the understanding of the Congress.[5] But if the Act of 1934 and the Criminal Appeals Rules are inapplicable to criminal cases in which there is a finding of guilt by the court but no waiver of jury, the Act of 1940 must similarly be inapplicable to such proceedings before finding. The language of the statutes certainly does not require this result.

Gompers v. *United States,* 233 U. S. 604, 611, affords a persuasive analogy. The statute of limitations for criminal offenses outlawed prosecution, trial or punishment "unless the indictment is found, or the information is instituted" within three years after the offense was committed. This

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[4] See the letter of Attorney General Murphy to Speaker Bankhead, quoted in H. Rept. 2492, 76th Cong., 3d Sess., p. 3.

[5] Cf. S. Rept. 1934, 76th Cong., 3d Sess., p. 1: "This Bill gives to the Supreme Court the rule-making power in criminal cases it has now over proceedings of a civil character; extending its power to make rules in criminal cases both before verdict or guilty finding or plea, as well as after." See also H. Rept. 2492, 76th Cong., 3d Sess., p. 2.

Court held the statute applicable to proceedings for criminal contempt not prosecuted by indictment or information. The quoted words were regarded as descriptive of the usual modes of instituting prosecution which occurred to the draftsman, not as determinative of the prosecutions barred.

II

THE CONTEMPT ADJUDICATED AND CHARGED WAS UNMISTAKABLY CRIMINAL AND THE PROCEEDING WAS APPROPRIATE FOR THE PURPOSE

1. The Judgment

Whatever may be true of their anterior stages, proceedings which culminate in a judgment of contempt are not ambiguous for purposes of appeal. If the judgment imposes unconditional fine or imprisonment, it is of criminal contempt. If it imposes a compensatory fine payable to the injured party or a fine or imprisonment conditional upon disobedience to an order of the court made for the benefit of a party, if the contemnors "carry the keep of their prison in their own pockets" (*In Re Nevitt,* 117 Fed. 444, 461 (C. C. A. 8th)), it is for civil contempt. And where the judgment embodies both sanctions, its character for this purpose is determined by its criminal aspect (*New Orleans* v. *Steamship Co.,* 20 Wall. 387; *Matter of Christensen Engineering Co.,* 194 U. S. 458; *Re Merchants' Stock Co., Petitioner,* 223 U. S. 639; *Union Tool Co.* v. *Wilson,* 259 U. S. 107, 110;

McCrone v. *United States*, 307 U. S. 61; *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th). See also *O'Shea* v. *O'Shea and Parnell* [1890] 15 L. R. P. D. 59, 62–63). These rules govern the procedure to be followed in invoking appellate review; and they have the simplicity desirable in rules serving this procedural end. If review is properly invoked, the appropriateness of the proceedings to support the judgment is, of course, an open question (See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 449; *Re Merchants' Stock Co., Petitioner, supra*).

Measured by this test, it is clear that the judgment in the present case was criminal, not civil.* It awards no relief to a private litigant. Instead, it imposes unconditional fines payable to the United States. While Nye was ordered to pay the costs of the contempt proceeding, including $500 to Guthrie, who brought the contempt to the attention of the court and conducted the prosecution, an order to pay the expenses of prosecution, including an attorney's fee, is a common incident of judgments imposing fines for criminal contempt. *Re Merchants' Stock Co., Petitioner, supra; Union*

* Compare the English terminology which usually distinguishes between criminal contempt and contempt in procedure. See Fox, *The Practice in Contempt of Court Cases*, 38 L. Q. R. 185, 188; 7 Halsbury's *The Complete Statutes of England*, Tit. Contempt of Court. *Annual Practice*, 1939, p. 809, distinguishes between "special" and "ordinary" contempts.

Tool Co. v. *Wilson, supra; Oates* v. *United States,* 233 Fed. 201 (C. C. A. 4th); *Wilson* v. *Byron Jackson Co., supra.* In *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 447 there was a sentence of imprisonment which, under the statute, precluded a fine. However, Rev. Stat., Sec. 974 (U. S. C., Title 28, Sec. 822) authorizes assessment of costs against convicted defendants in non-capital cases (See *Oates* v. *United States,* 233 Fed. 201, 207 (C. C. A. 4th), certiorari denied, 242 U. S. 633). Even were the award of costs to be reviewed as compensatory relief, "the unitive feature of the order is dominant and fixes its character for purposes of review" (*Re Merchants' Stock Co., Petitioner,* 223 U. S. 639 at p. 642).

Apart from the nature of the sentence, the judgment specifically found the petitioners guilty of misbehavior so near the presence of the court as to obstruct the administration of justice. This was unequivocal evidence that the purpose of the fines and of the adjudication of contempt was to vindicate the authority of the court not to perfect the remedies of a suitor (cf. *Fox* v. *Capital Co.,* 299 U. S. 105, 108). In none of the cases in which the character of a contempt has been in issue, was the judgment based upon this ground (cf. *In Re Sixth & Wisconsin Tower Inc.,* 108 F. (2d) 538, 540 (C. C. A. 7th) rather than the violation of an order of the court or interference with its execution (cf. *Lamb* v. *Cramer,* 285 U. S. 217)).

We submit, therefore, that the nature of the

judgment alone stamps the contempt as criminal for purposes of appellate review. In that event, as we have previously urged, this Court is without jurisdiction.

2. The Proceedings

(a) *The Prayer.*

The same conclusion is required, if we look behind the judgment to the anterior proceedings. The prayer of the motion for a rule to show cause has been said to be "determinative," at least when the petition is dismissed (*Lamb* v. *Cramer,* 285 U. S. 217, 220) and is highly significant in any event (*see Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 448–449). The prayer here was not for remedial punishment in aid of the main suit. It was (1) for an order to show cause why Nye should not be attached and held as for contempt of court; (2) for a direction to the United States Attorney to investigate whether Nye, Timberlake and Mayers conspired to defeat the administration of justice and to practice a fraud on the court, and whether they were guilty of subornation of perjury; (3) for a grand jury inquiry; and (4) for "such other and further procedure as to this Court may seem proper" (R. 12). Nothing was asked for Guthrie, who made the motion; nothing for Elmore, the plaintiff in the original action. There is not even a request for additional "relief" of any kind (cf. *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 448–449). What is sought is an adjudication of contempt and, in-

addition, an investigation, by the ordinary methods of the criminal law, of the contumacious acts alleged. This is the language not of private litigation but of public justice. It is hard to believe that had the petitioners been acquitted, it would have been held that Guthrie could appeal (cf. *Wingert* v. *Kieffer*, 29 F. (2d) 59 (C. C. A. 4th); *United States* v. *Bittner*, 11 F. (2d) 93 (C. C. A. 7th); *Lamb* v. *Cramer, supra*).

(b) *The Acts Charged.*

What has been said as to the judgment (*supra*, pp. 24–26) is true of the acts charged; if they constituted contempt at all, the contempt was unmistakably criminal. The analogous cases of obstruction of justice by interfering with witnesses, jurors and litigants, as well as with the court itself (See Point III, *infra*, pp. 33–35) have all been viewed as criminal not civil contempt. While neither the motion nor the order to show cause used the word "criminal" or referred to misbehavior so near the presence of the court as to obstruct the administration of justice, the court stated at an early stage of the proceedings that this was the issue to be tried (R. 16). Subpoenas *ad testificadum*, were issued to W. H. Elmore and others residing outside the Middle District of North Carolina and more than a hundred miles from the place where the court was held (R. 165). This could only have been authorized in a criminal case (U. S. C. Title 28, Sec. 654; see *Vincennes Steel Corp.* v. *Miller*, 94 F. (2d) 347 (C. C. A. 5th)).

(c) *The Parties and the Title.*

Nye and Mayers were not parties to Elmore's action. They were not in a position analogous to that of a party (cf. *Lamb* v. *Cramer*, 285 U. S. 217). They were strangers to the proceedings. This alone has been held to stamp an adjudication of contempt as criminal (*Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 329; see also *Doyle* v. *London Guarantee Co.*, 204 U. S. 599, 605; *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577, 578 (C. C. A. 9th); Fox, *Contempt of Court*, p. 44). Moreover, the movant in the contempt proceeding was not Elmore but Guthrie, an attorney and officer of the court. In the preliminary investigation which led to the issuance of the rule, Guthrie subpoenaed Elmore and examined him as an hostile witness (R. 54–55).

It is true that the proceedings in the District Court were entitled in Elmore's action and that the United States was not a party until the appeal; and that both circumstances have been regarded as important indicia of the nature of a contempt proceeding (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445–446). The Second Circuit has, indeed, adopted the rule that a contempt proceeding looking to the imposition of criminal penalties must be prosecuted by the court *sua sponte*, by the United States Attorney, or by an attorney for the private party specially ordered to prosecute criminally on behalf of the court (See *McCann* v. *New York Stock Exchange*, 80 F. (2d) 211, cer-

tiorari denied, 299 U. S. 603), though the order need not be entered at the outset (*National Popsicle Corp.* v. *Kroll*, 104 F. (2d) 259).

We recognize the value of the practice thus devised but deny its necessity in cases such as the one at bar. For unlike the cases in the Second Circuit, this prosecution was not for violating an order of the Court—the situation in which ambiguity as to the nature of the proceeding is typically present (see *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418; *Re Merchants' Stock Co., Petitioner*, 223 U. S. 639; *In Re Guzzardi*, 74 F. (2d) 671, 672 (C. C. A. 2d). It was for misbehavior so near the presence of the court as to obstruct the administration of justice. The basis for the rule of the Second Circuit, the inherent ambiguity of the proceeding (see *McCann* v. *New York Stock Exchange, supra*, at 214) is, therefore, missing in the present case. The petitioners ought not to have been uncertain "whether relief or punishment was the object in view" (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446; *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 329). Moreover, however the Second Circuit would view the problem in the present case, it is abundantly clear that in other circuits, including the Fourth, neither the fact that the papers are entitled in the original action nor the fact that the prosecution was conducted by an attorney for the private party is decisive of the nature of the proceeding or of its

sufficiency to support criminal penalties.[7] It may also be noted that when Congress in the Clayton Act tightened the procedural requirements in a class of contempt cases, which this Court held to be "criminal" in nature (*Michaelson* v. *United States*, 266 U. S. 42, 65), it provided for the institution of proceedings "upon the affidavit of some credible person" as well as upon information filed by the District Attorney or the return of a proper officer on lawful process (U. S. C., Title 28, Sec. 387).

Finally, we think the procedure in the present case would satisfy even the strict rule of the Second Circuit. The contempt prosecution, at least as against Mayers, appears to have been instituted by the Judge *sua sponte*, for Guthrie's motion asks for an order to show cause directed only to Nye (R. 12) although the order which was issued recites that the motion was directed against both (R. 8). There is also some indication in the recitals of the order to show cause that the judge based his order upon the sworn testimony of Elmore, which had been given on the preceding day in connection with the motion to dismiss, rather

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[7] *Kreplik* v. *Couch Patents Co.*, 190 Fed. 565 (C. C. A. 1st); *In re Star Spring Bed Co.*, 203 Fed. 640 (C. C. A. 3d); *In Re Kaplan Bros.*, 213 Fed. 753 (C. C. A. 3d), certiorari denied, 234 U. S. 765; *Wingert* v. *Kieffer*, 29 F. (2d) 59 (C. C. A. 4th); *Monroe Body Co.* v. *Herzog*, 18 F. (2d) 578 (C. C. A. 6th); *Wilson* v. *Byron Jackson Co.*, 93 F. (2d) 577 (C. C. A. 9th). See also *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446.

than upon the averments of Guthrie's petition, which indeed did little more than transcribe Elmore's testimony (R. 7, 10–11). Approximately the same procedure was followed in *Savin, Petitioner,* 131 U. S. 267, where the trial court, upon oral statements of the United States Attorney that Savin had endeavored to corrupt a witness in a pending criminal case, heard the testimony of the witness alleged to have been approached and thereupon issued an order to show cause.

We submit, therefore, that not only the judgment and sentence but also the charge and proceedings indicate that this was a criminal contempt; and that, if the issue can be examined, the proceedings were not inappropriate as a basis for such an adjudication.

III

THE FINDINGS SUPPORT THE ADJUDICATION OF CONTEMPT

Petitioners argue that the facts found by the District Court do not constitute "misbehavior * * * so near" the presence of the court "as to obstruct the administration of justice," within the meaning of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385). We submit that the contention is unsound.

In spite of the statement in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 418, that Section 268 "conferred no power not already granted

and imposed no limitations not already existing," we are content to measure the power of the District Court by the statute alone. That such was the purpose of the Act of March 2, 1931 (c. 99, 4 Stat. 487) from which Section 268 derives has been made abundantly clear (See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010, 1024–1038; Fox, *Contempt of Court,* p. 202 *et seq.* Thomas, *Problems of Contempt of Court,* pp. 53–74). Whatever may be true as to the powers of this Court (*Ex parte Robinson,* 19 Wall. 505, 510), the powers of the District Courts are within the control of Congress (*cf. Michaelson* v. *United States,* 266 U. S. 42; see *Cuddy, Petitioner,* 131 U. S. 280, 285). The question therefore is whether, within the meaning of the statute, the conduct of the petitioners constituted "misbehavior" and, if so, whether it was "so near" the presence of the court "as to obstruct the administration of justice."

1. The Petitioners' Conduct Constituted "Misbehavior"

The word "misbehavior" must presumably be read as a general designation of contumacious conduct; the limiting words of the statute are those which require that it be "in the presence of the court or so near thereto as to obstruct the administration of justice". That the petitioners' behavior, on the facts found, was contumacious we

see no reason to doubt. It was a deliberate attempt to thwart the prosecution of an action by undue influence exercised on the litigant and misrepresentation made to the court. Authority is not wanting, either in England[*] or in this country,[*] that such an attempt is a contempt when the means consists of force or threats directed against a suitor. The type of influence exerted in the present case is indistinguishable, as the Circuit Court of Appeals held (R. 173). What is significant is that the will of the litigant is controlled by improper means. The closest case in this Court is perhaps *United States* v. *Shipp*, 203 U. S. 563, 214 U. S. 386, in which the lynching of a prisoner sentenced to death, after a stay of execution granted by the Supreme Court, was held to be a contempt. The opinion by Mr. Justice Holmes disregards the contention that the stay was not addressed to the mob and rests upon the ground

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[*] See *Williams* v. *Lyons*, 8 Mod. 189, 88 Eng. Rep. 138; *Rex* v. *Carroll*, Wils., K. B. 74, 95 Eng. Rep. 500; *King* v. *Hall*, 2 Black. W. 1110, 96 Eng. Rep. 655; *Re Mulech*, 3 Sw. & Tr. 599, 164 Eng. Rep. 1407; *Smith* v. *Lakeman*, 26 L. J. Ch. (N. S.) 305; *Sharland* v. *Sharland*, 1 T. L. R. 492; *Kitcat* v. *Sharp*, 48 L. T. 64; *Cf. Ex parte Halsam*, 2 Atk. 49. For cases of publications abusive of a litigant, see *In re The Williams Thomas Shipping Co.* [1930] 2 Ch. 368; *O'Shea* v. *O'Shea and Parnell* [1890] 15 L. R. P. D. 59; *Butler* v. *Butler* [1888] 13 L. R. P. D. 73; *Litler* v. *Thomson*, 2 Beav. 129.

[*] *Turk and Wallen* v. *State*, 123 Ark. 341; *Snow* v. *Hawkes*, 183 N. C. 365; see *Whittem* v. *State*, 36 Ind. 196, 215; 23 A. L. R. 187.

that the purpose of the murder was to frustrate an appeal. The situation, which is in many respects weaker, of attempting to bribe or influence a juror or witness has also been held contumacious (*Savin, Petitioner,* 131 U. S. 267; *Cuddy, Petitioner,* 131 U. S. 280). To induce a defendant to abscond and default on his bond is a contempt (*Conley* v. *United States,* 59 F. (2d) 929 (C. C. A. 8th)). The Court of Appeals for the Second Circuit has said that "a person might so interpose between client and attorney as to obstruct justice; for instance, he might kidnap the attorney on the eve of trial", although holding that leaflets which would have diverted "only a hypersensitive client . . . from the defense of his right" did not constitute a contempt (*McCann* v. *New York Stock Exchange,* 80 F. (2d) 211, 213). In the present case the interposition almost succeeded; and the obstruction of justice was not threatened but real. If the authorities cited do not determine the instant question, they point unerringly to the result (see Thomas, *Problems of Contempt of Court,* pp. 13–17, 53–74).

Moreover, the conduct of the petitioners amounted to a misrepresentation to the court, designed to pervert judicial action. Elmore's letter must, under the circumstances, be regarded as the act of Nye and Mayers, misrepresenting Elmore's desire, while using him as an innocent agent. Although perjury by a witness is not, as such, contu-

macious, the rule rests on the special dangers inherent in such summary control over witnesses, and the absence of need so long as the process of cross-examination is available (*Ex parte Hudgings,* 249 U. S. 378). It is recognized that falsehood may have obstructive qualities which warrant a finding of contempt (*United States* v. *Appel,* 211 Fed. 495 (S. D. N. Y.) approved in *Ex parte Hudgings, supra;* see *Clark* v. *United States,* 289 U. S. 1; cf. *Lord* v. *Veazie,* 8 How. 250, 255). In *United States* v. *Pendergast,* 35 F. Supp. 593 (W. D. Mo.) a court of three judges, in an opinion by Judge Otis, did not hesitate to hold contumacious the bribery of a fiduciary litigant which resulted in misrepresentations to the court culminating in a false decree. The same principle is applicable here.

2. The Misbehavior Was in the Presence of the Court or "So Near Thereto As to Obstruct the Administration of Justice"

Whether the petitioners' misbehavior was in the presence of the Court or "so near thereto as to obstruct the administration of justice" presents a more serious question, but we think that the answer is the same. We do not doubt that the original Act of March 2, 1831 (Appendix, *infra,* pp. 44–45), enacted following the failure of the impeachment of Judge Peck, intended the quoted words as a genuine limitation on the power to punish contempts summarily. The second section of the statute, defining obstructive crimes punishable

upon indictment in the ordinary course, makes this perfectly clear.[10] The point of the distinction thus drawn between contempts punishable summarily and contumacious offenses which are ordinary crimes survives in the present statutes. Section 1 of the Act of 1831 has, with a formal change (see *Savin, Petitioner,* 131 U. S. 267, 276) come down as Section 268 of the Judicial Code. Section 2 of the Act has, with substantial changes, survived in Section 135 of the Criminal Code (U. S. C., Title 18, Sec. 241) (Appendix, *infra,* p. 45), where it is combined with the Act of June 10, 1872, c. 420 (17 Stat. 378). See Rev. Stat. Secs. 5399, 5404. Under the present statutes, as under the original Act, the problem is to classify contumacious behavior into that which may be dealt with summarily by the Court and that which can only be prosecuted in the ordinary course. That the two categories are not mutually exclusive was settled in *Savin, Petitioner,* 131 U. S. 267.

An early dictum said that in misbehavior cases the power of summary punishment can only be exercised to insure order and decorum in court (*Ex parte Robinson,* 19 Wall. 505, 511). This view was abandoned in *Savin, Petitioner,* 131 U. S. 267, 277, and *Cuddy, Petitioner,* 131 U. S. 280, in which the concept of judicial presence was expanded be-

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[10] See Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts,* 37 Harv. L. Rev. 1010, 1036–1038. cf. Thomas, *Problems of Contempt of Court,* pp. 21–27, 53–74.

yond its literal meaning, although the significance of the old criterion for cases outside the "presence" was specifically reserved (131 U. S. at 278). In *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, the order and decorum test was surrendered both by the majority of the Court and by the dissent. See also *Sinclair* v. *United States,* 279 U. S. 749, 764–765. It was also made clear that the language is not to be "spatially construed" (L. Hand, J. in *McCann* v. *New York Stock Exchange,* 80 F. (2d) 211, 213 (C. C. A. (2d). But cf. *Call* v. *United States,* 8 F. (2d) 20 (C. C. A. 1st)). In holding contumacious a publication critical of a judge in a pending case, the Court states the only test to be "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty" (247 U. S. at 419). The dissent of Mr. Justice Holmes, in which Mr. Justice Brandeis concurred, advanced a narrower rule. The words of the statute, they said,

> point only to the present protection of the Court from actual interference, and not to postponed retribution for lack of respect for its dignity * * *. Without invoking the rule of strict construction I think that "so near as to obstruct" means so near as actually to obstruct—and not merely near enough to threaten a possible obstruction. "So near as to" refers to an accomplished fact, and the word "misbehavior" strengthens the construction I adopt. Mis-

behavior means something more than adverse comment or disrespect" (247 U. S. at 423).

In the present case, we need not rely upon the broad scope of the majority opinion, which has been said to obliterate the statutory distinction between contempts to be treated summarily and those which can only be true crimes (see Frankfurter and Landis, *op. cit.*, 37 Harv. L. Rev. 1010 at 1037). The historically vexatious problem of contempt by publication (see Fox, *Contempt of Court,* 5–43; Laski, *Constructive Contempt in England,* 41 Harv. L. Rev. 1031) is not involved. The petitioners' conduct can claim no privilege in traditional freedom, in the dangers of summary punishment for speech or in the values inherent in criticism of the judicial as well as the other branches of the government (cf. Mr. Justice Holmes dissenting in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 422, and *Craig* v. *Hecht,* 263 U. S. 255, 280). There is no doubt that they were guilty of "misbehavior." When these aspects of the dissenting opinion in the *Toledo* case are put aside, we think the test which it lays down applies. A court without plaintiffs cannot do business as a court (cf. *United States* v. *Shipp,* 203 U. S. 563). And while the petitioners' effort to eliminate Elmore as a plaintiff ultimately failed, there was on actual obstruction of the administration of justice, necessitating long delay and large expense until Elmore's action in the District Court

could go on. Moreover, the petitioners' conduct culminated in the letter which they had Elmore send to the judge and which was received by him. If, as we contend (*supra*, pp. 34–35) the letter was a false representation to the court which was itself contumacious, it is undeniable that the misbehavior occurred in the actual presence of the court (cf. *Cooke* v. *United States* 267 U. S. 517; *United States* v. *Pendergast*, 35 F. Supp. 593, 596–597 (W. D. Mo.); *Keeney* v. *United States*, 17 F. (2d) 976, 978 (C. C. A. 7th); *Bowles* v. *United States*, 50 F. (2d) 848 (C. C. A. 4th), certiorari denied, 284 U. S. 648. See also *Sinclair* v. *United States*, 279 U. S. 749, 764–765).

Petitioners also argue that the evidence was insufficient to support the finding on the crucial point that they exerted undue influence upon Elmore. We do not relate the evidence in detail, since the petitioners statement makes clear that the most they can establish is that it was in genuine conflict (cf. *Bessette* v. *Conkey*, 194 U. S. 324, 338; *Oates* v. *United States*, 233 Fed. 201, 206 (C. C. A. 4th), certiorari denied, 242 U. S. 633).

IV

THE TRIAL COURT WAS NOT DEPRIVED OF JURISDICTION BY THE DELAY IN FILING A VERIFICATION OF THE MOTION FOR ORDER TO SHOW CAUSE

There is clearly no merit in petitioners' contention that the District Court was without jurisdic-

tion because the verification was filed a week after the motion for order to show cause. The petitioners were not attached on the basis of the motion. It may be doubted, therefore, whether an affidavit was necessary at all (cf. *Creekmore* v. *United States,* 237 Fed. 743 (C. C. A. 8th), certiorari denied, 242 U. S. 646). In any event, the petitioners appeared and raised no objection on this score until November 17, 1939, more than two weeks after the case had been tried and the evidence heard (R. 15–16). Under these circumstances the Circuit Court of Appeals properly held that the petitioners "waived the defect by their participation in the proceeding, even if it be supposed that the filing of an affidavit on October 7 was too late." (R. 171.) *Sona* v. *Aluminum Castings Co.,* 214 Fed. 936, 938–941 (C. C. A. 6th), and authorities there cited; *In re Odum,* 133 N. C. 250; *People* v. *Severinghaus,* 313 Ill. 456 (1924); see *Aaron* v. *United States,* 155 Fed. 833, 836 (C. C. A. 8th, 1907); *Morehouse* v. *Giant Powder Co.,* 206 Fed. 24, 27 (C. C. A. 9th, 1913).

It may be noted in addition that the principal allegations on which the rule to show cause was issued had actually been sworn to by Elmore on September 29, 1939, prior to the issuance of the rule, in his testimony on the motion to dismiss his suit against the BC Remedy Company. Elmore's testimony was embodied practically verbatim in

Guthrie's motion (R. 10). The motion also referred to testimony previously given by Nye to the effect that he had employed Timberlake, the attorney who prepared the letter and final account for Elmore. The order to show cause itself shows that it was issued on the basis of sworn testimony (R. 8). To a considerable extent, also, the controlling facts were within the personal knowledge of the judge, e. g. the appointment of Guthrie to represent Elmore, the receipt of the letter which the respondents caused Elmore to write to the judge and to Guthrie, the delays in the principal suit which resulted from these letters. Under these circumstances, the court might have issued the rule to show cause *sua sponte*, without any petition or motion. The respondents were entitled to be advised of the nature of the charge against them and to be given a fair opportunity to defend. *Savin, Petitioner,* 131 U. S. 267; *Camarota* v. *United States,* 111 F. (2d) 243, 246 (C. C. A. 3d, 1940), certiorari denied, 85 L. Ed. 60; see *Aaron* v. *United States, supra; Morehouse* v. *Giant Powder Co., supra.* They do not contend that these rights were denied.

V

THE JUDGMENT OF CONTEMPT DID NOT FALL WITH THE SETTLEMENT OF ELMORE'S ACTION FOR WRONGFUL DEATH

Petitioners argue that the settlement of Elmore's action for wrongful death, pending this

appeal, requires the judgment of contempt to be set aside. Their contention rests upon the premise that the contempt was civil (see *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 452) and, as we have shown, the premise is unsound.

CONCLUSION

We respectfully submit that neither the Circuit Court of Appeals nor this Court has jurisdiction to review the judgment of the District Court; and that the writ of certiorari should therefore be dismissed or, in the alternative, the judgment should be reversed with direction to the Circuit Court of Appeals to dismiss the appeal. In the event that there is jurisdiction, the judgment of the Circuit Court of Appeals should be affirmed.

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MARCH 1941.

APPENDIX

The Act of March 8, 1934, c. 49, 48 Stat. 399 (U. S. C., Title 28, Sec. 723a), insofar as material, provides:

> That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States. * * *
>
> SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Act of February 13, 1925, c. 229, 43 Stat. 936, as amended:

> SEC. 8 (c). No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree (U. S. C., Title 28, Sec. 230).

Judicial Code:

> SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary

oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (U. S. C., Title 28, Sec. 385).

Act of March 2, 1831, c. 99, 4 Stat. 487 provides:

That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transaction, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any jur . , witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or

impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Criminal Code, Section 135 (U. S. C., Title 18, Sec. 241).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both (R. S. §§ 5399, 5404; Mar. 4, 1909, c. 321, § 135, 35 Stat. 1113).

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SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1940.

R. H. Nye and L. C. Mayers, Petitioners, *vs.* The United States of America and W. B. Guthrie. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 14, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners were adjudged guilty of contempt under § 268 of the Judicial Code (36 Stat. 1163, 28 U. S. C. § 385) for their efforts to obtain a dismissal of a suit brought by one Elmore in the federal District Court for the Middle District of North Carolina. Elmore, administrator of the estate of his son, brought that action, *in forma pauperis*, against one Council and Bernard, partners, trading as B. C. Remedy Co., and alleged that his son died as a result of the use of a medicine, known as B C and manufactured and sold by them. The court appointed William B. Guthrie to represent Elmore. Defendants filed an answer April 29, 1939. On April 19, 1939, Elmore notified the District Judge and his lawyer by letters that he desired to have the case dismissed. The substance of the episode involving the improper conduct of petitioners was found as follows: 'Elmore is illiterate, and feeble in mind and body. Petitioners,[1] through the use of liquor and persuasion, induced Elmore to seek a termination of the action. Nye directed his own lawyer to prepare the letters to the District Judge and to Guthrie and to prepare a final administration account to be filed in the local probate court. Nye took Elmore to the probate court, had him discharged as administrator, and paid the clerk a fee of $1. He then took Elmore to the postoffice, registered the letters and paid the postage. Elmore, however, was not promised or paid anything.

[1] Nye's daughter was married to the son of Council, one of the defendants in the Elmore action. Mayers (Meares) was Nye's tenant who was acquainted with Elmore.

These events took place more than 100 miles from Durham, North Carolina, where the District Court was located.

On September 30, 1939, Guthrie filed a motion[2] asking for an order requiring Nye to show cause "why he should not be attached and held as for contempt of this Court".[3] The court issued a show cause order to Nye and Mayers who filed their answers. There was a hearing. Evidence was introduced and argument was heard on motions to dismiss. The court found that the writing of the letters and the filing of the final account were procured by Nye "for the express and definite purpose of preventing the prosecution of the civil action in the federal court and with intent to obstruct and to prevent the trial of the case on its merits"; and that the conduct of Nye and Mayers "did obstruct and impede the due administration of justice in this cause; that the conduct has caused a long delay, several hearings and enormous expense." It accordingly held that their conduct was "misbehavior so near to the presence of the court as to obstruct the administration of justice" and adjudged each guilty of contempt. It ordered Nye to pay the costs of the contempt proceedings, including $500 to Guthrie, and a fine of $500; and it ordered Mayers to pay a fine of $250. The District Court filed its finding of facts and judgment on February 8, 1940. On March 16, 1940, petitioners filed a notice of appeal from the judgment.[4] The Circuit Court of Appeals affirmed that judg-

[2] The court had deferred action on Elmore's inspired request for a dismissal at the request of Guthrie and pending an investigation by him. On July 20, 1939, Nye and Elmore's son were examined under oath before the court as to the episode. On August 29, 1939, defendants moved to dismiss Elmore's action on the ground that he had been discharged as administrator. A hearing was held on that motion and Elmore testified respecting his discharge. The evidence so adduced was the basis of the motion for an order to show cause on September 30, 1939.

[3] The motion for an order to show cause also prayed: "2. That the Court call to the attention of the United States District Attorney for this district the entire record in this cause with request to the said United States District Attorney to investigate the question as to whether or not a conspiracy was entered into by and between R. H. Nye, W. E. Timberlake and L. G. Mayers, all of Robeson County, North Carolina, to defeat the administration of justice and the orderly process of this Court and further as to whether or not they have been guilty of subornation of perjury and further whether they conspired to practice a fraud and did practice a fraud upon this Court. 3. That this matter through the office of the United States District Attorney for this district be submitted and inquired into by the Grand Jury for such action and attention the Grand Jury shall deem proper. 4. For such other and further procedure as to this Court may seem proper."

[4] On March 13, 1940, Elmore, with the assent of Guthrie, submitted to a judgment of voluntary non-suit in the action for wrongful death upon payment of a "substantial sum".

ment.[5] 113 F. (2d) 1006. We granted the petition for certiorari because the interpretation of the power of the federal courts under § 268 of the Judicial Code to punish contempts raised matters of grave importance.

We are met at the threshold with a question as to the jurisdiction of the Circuit Court of Appeals over the appeal. The government concedes that if this was a case of civil contempt, the notice of appeal was effective under Rule 73 of the Rules of Civil Procedure. It argues, however, that the contempt was criminal—in which case the appeal was not timely if the Criminal Appeals Rules govern,[6] and not made in the proper form if § 8(c) of the Act of February 13, 1925 (43 Stat. 936, 940, 45 Stat. 54, 28 U. S. C. § 230) is applicable.[7]

We do not think this was a case of civil contempt. We recently stated in *McCrone* v. *United States*, 307 U. S. 61, 64, "While particular acts do not always readily lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public." The facts of this case do not meet that standard. While the proceedings in the District Court were entitled in Elmore's action and the United States was not a party until the appeal, those circumstances though relevant (*Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 445-446) are not conclusive as to the nature of the contempt. The fact that Nye was ordered to pay the costs of the proceeding, including $500 to Guthrie, is also not decisive. As Mr. Justice Brandeis stated in *Union Tool Co.* v. *Wilson*, 259 U. S. 107, 110, "Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the

[5] The United States was made a party when the case was docketed in the Circuit Court of Appeals. It entered its appearance but its attorneys apparently took no further part in the proceedings in that court.

[6] Promulgated May 7, 1934. Rule III provides that an appeal shall be taken within five days after entry of judgment of conviction or of an order denying a motion for new trial. In the present case, the notice of appeal was filed more than a month after the judgment of the District Court. In case the Criminal Appeals Rules govern, the government also points out that Rule XI requires that petitions for certiorari to review a judgment of the appellate court shall be made within thirty days after the entry of judgment of that court. In the present case the petition for a writ of certiorari was filed about two months after the judgment of the Circuit Court of Appeals.

[7] "No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

order is dominant and fixes its character for purposes of review." The order imposes unconditional fines payable to the United States. It awards no relief to a private suitor. The prayer for relief[8] and the acts charged[9] carry the criminal hallmark. Cf. *Gompers* v. *Bucks Stove & Range Co., supra,* p. 449. They clearly do not reveal any purpose to punish for contempt "in aid of the adjudication sought in the principal suit". *Lamb* v. *Cramer,* 285 U. S. 217, 220. When there is added the "significant" fact (*Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329) that Nye and Mayers were strangers, not parties, to Elmore's action, there can be no reasonable doubt that the punitive character of the order was dominant.

We come then to the question of the jurisdiction of the Circuit Court of Appeals. We disagree with the government in its contention that the appeal in this case was governed by the Criminal Appeals Rules. Those rules were promulgated pursuant to the provisions of the Act of March 8, 1934 (48 Stat. 399; 28 U. S. C. § 723a) which provided, *inter alia,* that this Court should have "the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases." The rules were adopted "as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases." 292 U. S. 661. In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the court where a jury was waived. To be sure, the rules and the Act are applicable "in criminal cases". But we do not agree with the government that the qualifying language of the rules designates merely the stage of the proceedings "in criminal cases" when the rules become applicable. It is our view that the rules describe the kinds of cases to which they are to be applied. The Act of March 8, 1934 amended the Act of February 24, 1933 (47 Stat. 904) which gave this Court rule-making power "with respect to any or all proceedings after verdict in criminal cases." The legislative history makes it abundantly clear

[8] *Supra,* note 3.

[9] On October 30, 1939, the District Court denied motions to dismiss the rule to show cause saying that "the question to be determined is whether the respondents, or either of them, is guilty of misbehavior in the presence of the Court, or so near thereto to obstruct the administration of justice in this Court, and that is a matter of fact to be determined by the evidence and not on motion."

that the amendment in 1934, so far as material here, was made because "it would not seem to be desirable that there should be different times and manner of procedure in cases of appeal where there is a verdict of a jury as distinguished from cases in which there is a finding of guilt by the court on the waiver of a jury." H. Rep. No. 858, 73d Cong., 2d Sess., p. 1; S. Rep. No. 257, 73d Cong., 2d Sess., p. 1. In light of this history and the language of the order promulgating the rules we conclude that the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case.

That conclusion means that this appeal was governed by § 8(c) of the Act of February 13, 1925. The court is equally divided in opinion as to whether the Circuit Court of Appeals, in absence of an application for allowance of the appeal, had the power to decide the case on the merits. Hence the action of that court in taking jurisdiction over the appeal is affirmed.

We come then to the merits.

The question is whether the conduct of petitioners constituted "misbehavior . . . so near" the presence of the court "as to obstruct the administration of justice" within the meaning of § 268 of the Judicial Code.[10] That section derives from the Act of March 2, 1831 (4 Stat. 487). The Act of 1789 (1 Stat. 73, 83) provided that courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." Abuses arose,[11] culminating in impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Judge Peck was acquitted.[12] But the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress

[10] This section provides: "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

[11] See Nelles & King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 409 *et seq.*

[12] Stansbury, Report of the Trial of James H. Peck (1833).

of the broad undefined power of the inferior federal courts under the Act of 1789.

The day after Judge Peck's acquittal Congress took steps to change the Act of 1789. The House directed its Committee on the Judiciary "to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same."[13] Nine days later James Buchanan brought in a bill which became the Act of March 2, 1831. He had charge of the prosecution of Judge Peck and during the trial had told the Senate:[14] "I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim." The Act of March 2, 1831, "declaratory of the law concerning contempts of court," contained two sections, the first of which provided:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Sec. 2 of that Act, from which § 135 of the Criminal Code[15] (35 Stat. 1113, 18 U. S. C. § 241) derives, provided:

"That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, wit-

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[13] 7 Cong. Deb., 21st Cong., 2d Sess., Feb. 1, 1831, Cols. 560-561. And see House Journal, 21st Cong., 2d Sess., p. 245.

[14] Stansbury, *op. cit.*, p. 430.

[15] That section presently provides: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

ness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence."

In 1918 this Court in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 418, 419, stated that "there can be no doubt" that the first section of the Act of March 2, 1831 "conferred no power not already granted and imposed no limitations not already existing"; and that it was "intended to prevent the danger, by reminiscence of what had gone before, of attempts to exercise a power not possessed which . . . had been sometimes done in the exercise of legislative power." The inaccuracy of that historic observation has been plainly demonstrated. Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers,* 37 Harv. L. Rev. 1010. Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined. That the previously undefined power of the courts was substantially curtailed by that Act was early recognized by lower federal courts. *United States* v. *Holmes,* Fed. Cas. No. 15,383, at p. 363; *Ex parte Poulson,* Fed. Cas. No. 11,350; *United States* v. *New Bedford Bridge,* Fed. Cas. No. 15,867, at p. 104; *United States* v. *Seeley,* Fed. Cas. No. 16,248a; *United States* v. *Emerson,* 4 Cranch (C. C.) 188; *Kent's Commentaries* (3rd ed. 1836) pp. 300-301. And when the Act came before this Court in *Ex parte Robinson,* 19 Wall. 505, 511, Mr. Justice Field, speaking for the Court, acknowledged that it had limited the power of those courts. And see *Ex parte Bradley,* 7 Wall. 364, 374. So far as the decisions of this Court are concerned, that view persisted to the time when *Toledo Newspaper Co.* v. *United States, supra,* was decided. See *Ex parte Wall,* 107 U. S. 265; *Savin, Petitioner,* 131 U. S. 267, 276; *Cuddy, Petitioner,* 131 U. S. 280, 285; *Eilenbecker* v. *District Court,* 134 U. S. 31, 38.

Mindful of that history, we come to the construction of § 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words "so near thereto" have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms. In *Ex parte Robinson, supra,* at p. 511, it was said that as a result of those provisions the power to punish for contempts "can only be exercised to insure order and decorum" in court. "Misbehavior of any person in their presence" plainly falls in that category. *Ex parte Terry,* 128 U. S. 289. And in *Savin, Petitioner, supra,* it was also held to include attempted bribes of a witness, one in the jury room and within a few feet of the court room and one in the hallway immediately adjoining the court room. See *Cooke* v. *United States,* 267 U. S. 517. The phrase "so near thereto as to obstruct the administration of justice" likewise connotes that the misbehavior must be in the vicinity of the court. Nelles & King, *Contempt by Publication in the United States,* 28 Col. L. Rev. 525, 530. It is not sufficient that the misbehavior charged has some direct relation to the work of the court. "Near" in this context, juxtaposed to "presence", suggests physical proximity not relevancy. In fact, if the words "so near thereto" are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of "misbehavior" which will "obstruct the administration of justice" but which may not be "in" or "near" to the "presence" of the court. Broad categories of such acts, however, were expressly recognized in § 2 of the Act of March 2, 1831 and subsequently in § 135 of the Criminal Code. It has been held that an act of misbehavior though covered by the latter provisions may also be a contempt if committed in the "presence" of the Court. *Savin, Petitioner, supra.* And see *Sinclair* v. *United States,* 279 U. S. 749. Yet in view of the history of those provisions, meticulous regard for those separate categories of offenses must be had, so that the instances where there is no right to jury trial will be narrowly restricted. If "so near thereto" be given a causal meaning, then § 268 by the process of judicial construction will have regained much of the generality which Congress in 1831 emphatically intended to remove. See Thomas, *Problems of Contempt of*

Court (1934) c. VII. If that phrase be not restricted to acts in the vicinity of the court but be allowed to embrace acts which have a "reasonable tendency" to "obstruct the administration of justice" (*Toledo Newspaper Co.* v. *United States, supra,* p. 421) then the conditions which Congress sought to alleviate in 1831 have largely been restored. See Fox, *The History of Contempt of Court* (1927) c. IX. The result will be that the offenses which Congress designated as true crimes under § 2 of the Act of March 2, 1831 will be absorbed as contempts wherever they may take place. We cannot by the process of interpretation obliterate the distinctions which Congress drew.

We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power. But that is no reason why we should adhere to the construction adopted by *Toledo Newspaper Co.* v. *United States, supra,* and leave to Congress the task of delimiting the statute as thus interpreted. Though the statute in question has been on the books for over a century, it has not received during its long life the broad interpretation which that decision gave it. Rather, that broad construction is relatively recent. So far as decisions of this Court are concerned, the statute did not receive any such expanded interpretation until *Toledo Newspaper Co.* v. *United States, supra,* was decided in 1918. The decisions of this Court prior to 1918 plainly recognized, as we have noted, that Congress through the Act of March 2, 1831 had imposed a limitation on the power to punish for contempts—a view consistent with the holdings of the lower federal courts during the years immediately following the enactment of the statute. The early view was best expressed in *Ex parte Poulson, supra,* decided in 1835. In that case it was held that the Act of March 2, 1831 gave the court no power to punish a newspaper publisher for contempt for publishing an "offensive" article relative to a pending case. It was held that the first section of the Act "alludes to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business." p. 1208. That was a plain recognition that the words "so near thereto" connoted physical proximity. And prior to 1918 the decisions of this Court did not depart from that theory,

however they may have expanded the earlier notions of "misbehavior". To be sure, the lower federal courts in the intervening years had expressed a contrariety of views on the meaning of the statute[16] and some were giving it an expanded scope[17] which was later approved in *Toledo Newspaper Co.* v. *United States, supra.* But it is significant that not until after the turn of this century did the first line of fracture appear suggesting that the statute authorized summary punishment for publication.[18] Thus the legislative history of this statute and its career demonstrate that this case presents the question of correcting a plain misreading of language and history so as to give full respect to the meaning which Congress unmistakably intended the statute to have. Its legislative history, its interpretation prior to 1918, the character and nature of the contempt proceedings admonish us not to give renewed vitality to the doctrine of *Toledo Newspaper Co. v. United States, supra,* but to recognize the substantial legislative limitations on the contempt power which were occasioned by the Judge Peck episode. And they necessitate an adherence to the original construction of the statute so that, unless its requirements are clearly satisfied, an offense will be dealt with as the law deals with the run of illegal acts. Cf. Mr. Justice Holmes dissenting in *Toledo Newspaper Co.* v. *United States, supra,* pp. 422 *et seq.*

The conduct of petitioners (if the facts found are taken to be true) was highly reprehensible. It is of a kind which corrupts the judicial process and impedes the administration of justice. But the fact that it is not reachable through the summary procedure of contempt does not mean that such conduct can proceed with impunity. Sec. 135 of the Criminal Code, a descendant of § 2, of the Act of March 2, 1831, embraces a broad category of offenses. And certainly it cannot be denied that the conduct here in question

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[16] That "so near thereto" is a geographical term see Ex parte Schulenburg, 25 Fed. 211, 214 (1885); Hillmon v. Mutual Life Ins. Co., 79 Fed. 749 (1897); Morse v. Montana Ore-Purchasing Co., 105 Fed. 337, 347 (1900); Cuyler v. Atlantic & N. C. R. Co., 131 Fed. 95 (1904). And see Nelles & King, *op. cit.*, pp. 532, 539-542.

[17] For cases expanding the concept of "presence" and "so near thereto" see In re Brule, 71 Fed. 943 (1895); McCaully v. United States, 25 App. D. C. 404 (1905); United States v. Zavelo, 177 Fed. 536 (1910); Kirk v. United States, 192 Fed. 273 (1911); In re Independent Pub. Co., 228 Fed. 787 (1915).

[18] Nelles & King, *op. cit.*, p. 539 citing Ex parte McLeod, 120 Fed. 130 (1903) and United States v. Huff, 206 Fed. 700 (1913).

comes far closer to the family of offenses there described than it does to the more limited classes of contempts described in § 268 of the Judicial Code. The acts complained of took place miles from the District Court. The evil influence which affected Elmore was in no possible sense in the "presence" of the court or "near thereto". So far as the crime of contempt is concerned, the fact that the judge received Elmore's letter is inconsequential.

We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed. And it would follow that under the "reasonable tendency" rule of *Toledo Newspaper Co.* v. *United States, supra,* the court below did not err in affirming the judgment of conviction. But for the reasons stated that decision must be overruled. The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. Cf. *Savin, Petitioner, supra,* at p. 278. Hence, it was not embraced within § 268 of the Judicial Code. If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions. Accordingly, the judgment below is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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SUPREME COURT OF THE UNITED STATES.

No. 558.—October Term, 1940.

R. H. Nye and L. C. Mayers, Petitioners, *vs.* The United States of America and W. B. Guthrie. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 14, 1941.]

Mr. Justice Stone.

The court below did not pass on the question, mooted here, whether it acquired jurisdiction under the appeal provisions of the applicable section, 8(c) of the Jurisdictional Act of February 13, 1925. Only four members of this Court are of opinion that it did. Assuming for present purposes that it had jurisdiction to decide the merits, I think its decision was right and that the judgment below should be affirmed.

We are concerned here only with the meaning and application of an act of Congress which has stood unamended on the statute books for one hundred and ten years. It gives statutory recognition to the power of the federal courts to punish summarily for contempt and provides that that power "shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice".

The issue is not whether this statute has curtailed an authority which federal courts exercised before its enactment. Concededly it has. The only question before us is whether it has so limited that authority as to preclude summary punishment of the contemptuous action of petitioner which it is not denied, is "misbehavior" although not in the presence of the court, and which it is admitted seriously obstructed the administration of justice in a cause pending in the court. The question is important, for if conduct such as this record discloses may not be dealt with summarily the only recourse of a federal court for the protection of the integrity of proceedings pending before it, from acts of corruption and intimida-

tion outside the court room, is to await the indictment of the offenders, with or without adjournment of the pending proceedings as the exigencies of the case may require.

It is not denied that the distance of the present contemptuous action from the court in miles did not lessen its injurious effect, and in that sense it was "near" enough to obstruct the administration of justice. The opinion of the Court supports its conclusion on the ground that "near" means only geographical nearness and so implicitly holds that no contempt is summarily punishable unless it is either in the presence of the court or is some kind of physical interference with or disturbance of its good order, so that the nearness to the court of the contemptuous act has an effect in obstructing justice which it would not have if it took place at a more distant point. From all this it seems to follow that the surreptitious tampering with witnesses, jurors or parties in the presence of the court, although unknown to it, would be summarily punishable because in its presence, but that if it took place outside the court room or while the witness, juror or party was on his way to attend court it would not be punishable because geographical nearness is not an element in making the contemptuous action an obstruction to justice.

These contentions assume that "so near thereto" can only refer to geographical position and they ignore the entire history of the judicial interpretation of the statute. "Near" may connote proximity in causal relationship as well as proximity in space, and under this statute as the opinion seems to recognize even the proximity to the court, in space, of the contemptuous action, is of significance only in its causal relationship to the obstructions to justice which result from disorder or public disturbances. This Court has hitherto, without a dissenting voice, regarded the phrase "so near thereto" as connoting and including those contempts which are the proximate cause of actual obstruction to the administration of justice, whether because of their physical nearness to the court or because of a chain of causation whose operation in producing the obstruction depends on other than geographical relationships to the court. See *Savin, Petitioner,* 131 U. S. 267; *Cuddy, Petitioner,* 131 U. S. 280; *Toledo Newspaper Company* v. *United States,* 247 U. S. 402; *Sinclair* v. *United States,* 279 U. S. 749, 764, 765; *Craig* v. *Hecht,* 263 U. S. 255. Cf. *McCann* v. *New York Stock Exchange,* 80 F. (2d) 211, 213. Contempts which obstruct justice because of their effect on

the good order and tranquillity of the court must be in the presence of the court or geographically near enough to have that effect. Contempts which are surreptitious obstructions to justice, through tampering with witnesses, jurors and the like, must be proximately related to the condemned effect. We are pointed to no legislative history which militates against such a construction of the statute.

In the *Savin*, the *Craig*, and the *Sinclair* cases, as well as in the *Toledo* case, the contempts were of this latter kind. The contempt held summarily punishable by this Court in the *Savin* case, decided sixty years ago, was the attempted bribery of a witness at a place in the court house but outside the courtroom, without any disorder or disturbance of the court. The contemptuous acts in the other cases took place at points distant from the court in the city where it sat. In all, the injurious effect on the administration of justice was unrelated to the distance from the court. In holding that they were contempts within the summary jurisdiction of the court this Court definitely decided that "so near thereto" is not confined to a spatial application where the evil effect of the alleged contempt does not depend upon its physical nearness to the court.

The *Savin* and *Sinclair* cases were decided by a unanimous court. The dissenting judges in the *Toledo* and *Craig* cases, in which the acts held to be contemptuous were the publication, at a distance from the court, of comments derogatory to the judge, made no contention that the phrase imposed a geographical limitation on the power of the court. Their position was that the particular contemptuous acts charged did not in fact have the effect of obstructing justice, a contention which cannot be urged here. In the *Toledo* case Justice Holmes said, page 423: "I think that 'so near as to obstruct' means so near as actually to obstruct and not merely near enough to threaten a possible obstruction". And in the *Craig* case, after commenting on the fact that no cause was pending before the court, he said, p. 281: "Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice. . . ." Complete agreement with the dissents in these cases neither requires the Court's decision here nor lends it any support.

I do not understand my brethren to maintain that the secret bribery or intimidation of a witness in the court room may not be summarily punished. Cf. *Savin, supra; Sinclair, supra.* If so it

is only because of the effect of the contemptuous act in obstructing justice which is precisely the same if the bribery or intimidation took place outside the court house. If it may be so punished I can hardly believe that Congress, by use of the phrase "so near thereto", intended to lay down a different rule if the contemptuous acts took place across the corridor, the street, in another block, or a mile away.

If the point were more doubtful than it seems to me, I should still think that we should leave undisturbed a construction of the statute so long applied and not hitherto doubted in this Court. We recently declined to consider the contention that the Sherman Act can never apply to a labor union, because of long standing decisions of this Court to the contrary, a construction which Congress had not seen fit to change. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 487, 488.

In view of our earlier decisions and of the serious consequences to the administration of justice if courts are powerless to stop summarily, obstructions like the present, I think the responsibility of departing from the long accepted construction of this statute should be left to the legislative branch of the Government to which it rightfully belongs.

The CHIEF Justice and Mr. Justice ROBERTS concur in this opinion.